IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 16657 of 2004
SPECIAL CIVIL APPLICATION No 16716 of 2004
SPECIAL CIVIL APPLICATION No 515 of 2005

For Approval and Signature:

HON'BLE MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PIUSHKUMAR JAYANTILAL GANDHI TRUSTEE

Versus

RAMESHCHANDRA GORDHANBHAI PATEL

Appearance:

Special Civil Application No. 16657 of 2004

MR PM THAKKAR WITH MS SHAILI A KAPADIA for Petitioner No. 1-2

MR RD DAVE for Respondent No. 1-2

MR MUKESH PATEL, AGP for Respondent No. 3

SPECIAL CIVIL APPLICATION No 16716 of 2004

DETOSTOP INDIA LTD

Versus

GHANCHI HARILAL GIRDHARLAL WILL KHANGI TRUST

Appearance:

Special Civil Application No. 16716 of 2004
MR MI MERCHANT for Petitioner No. 1
MR PM THAKKAR WITH MS SHAILI KAPADIA for Respondent No. 1
MR RD DAVE for Respondent No. 2-3
MR MUKESH PATEL, AGP for Respondent No. 4

SPECIAL CIVIL APPLICATION No 515 of 2005

RAMESHCHANDRA GORDHANBHAI PATEL
Versus
GANCHI HARILAL GIRDHARLAL PUBLIC TRUST

Appearance:
Special Civil Application No. 515 of 2005
MR RD DAVE for Petitioner No. 1-2
MR PM THAKKAR WITH MS SHAILI KAPADIA for
Respondent No. 1-1/2,
MR MUKESH PATEL, AGP for Respondent No. 2
MR MI MERCHANT for Respondent No.3
MR JB PARDIWALA for Respondent No. 4

CORAM : HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 12/05/2005

C.A.V. JUDGEMENT

Special Civil Application No.16657 of 2004.

1. Rule. Mr.R.D.Dave, learned advocate waives service of rule on behalf of respondents No.1 and 2, and Mr.Mukesh Patel, learned AGP waives service of rule on behalf of respondent No.3.

Special Civil Application No.16716 of 2004.

1.1 Rule. Ms.Sahili A.Kapadia, learned advocate waives service of rule on behalf of respondent No.1 - trust, Mr.R.D.Dave, learned advocate waives service of rule on behalf of respondent No.2 & 3 and Mr.Mukesh Patel, ld. AGP waives service of rule on behalf of respondent No.4 Charity Commissioner.

Special Civil Application No.515 of 2005.

1.1A Rule. Ms.Shaili Kapadia, learned advocate waives service of rule on behalf of respondent No.1- trust, Mr.Mukesh Patel, learned AGP waives service of rule on

behalf of respondent No.2, Mr.M.I.Merchant, learned advocate waives service of rule on behalf of respondent No.3 M/s.Detostop India Pvt. Ltd. and Mr.J.B.Pardiwala, learned advocate waives service of rule on behalf of respondent No.4 Parshwa Realty Pvt. Ltd.

1.2 It may be noted that in all the three matters the respective petitioners have challenged the order of the Gujarat Revenue Tribunal in Appeal No.53 of 2003 dated 25.10.2004 and, therefore, I have heard all these matters together because these petitions raise common question of facts and law in this behalf.

2. Special Civil Application No.16657 of 2004 filed by Ghanchi Harilal Girdharlal Public Trust.

2.1 Ghanchi Harilal Girdharlal Public Trust (hereinafter referred to as a "Trust") and others, petitioners, have filed this petition through their trustees Piyushkumar Jayantilal Gandhi and Chandrakant Chimanlal Gandhi with a prayer that this Court may issue a writ of certiorari or writ of mandamus or any other appropriate writ, order or direction, quashing and setting aside the order of Gujarat Revenue Tribunal in Appeal No.TEN.AA/53/2003 dated 25th October, 2004, and further be pleased to restore the order of Joint Charity Commissioner dated 14th November, 2003. The said petition was filed on 14th December, 2004.

3. The facts giving rise to this petition are as under:-

3.1 There is an immovable property situated at Final Plot No.146, T.P.Scheme No.19 of Village Manjalpur, Vadodara, ad-measuring about 2908 sq.mtrs. of land (hereinafter referred to as "the property in question"). Originally, one Shri Ghanchi Harilal Girdharlal was the owner of the land, however, Harilal Girdharlal Ghanchi had executed a will dated 9.9.1951, thereby a trust was created which was registered under provisions of Bombay Public Trusts Act as public trust. By virtue of the said will, which is on page 31 of the paper book, there were two trustees namely, one Nagjibhai Chhotalal Ghanchi and one Chimanlal Ghanchi and property in question was vested in the trust and become property of the trust.

3.2 After the death of Harilal Girdharlal Ghanchi, the trustees were managing the said property. Somewhere on 19.1.2002 the trustees passed a resolution to sell the property in question. From the record it appears that,

in the said building, there were some tenants also and the trust decided to sell the property in question along with the tenants. Thereafter, as per Section 36(1) of the Bombay Public Trusts Act (hereinafter referred to as "the Act"), the trustees filed an application dated 4.2.2002 before the Joint Charity Commissioner seeking prior permission for such sale of the property in question. It was stated that, because of properties is tenanted, the trust receives only Rs.435/- per month as income/rent of the property. It was decided that whoever gives highest price the trust will sell the same. Originally, the property in question was used as Dharamshala, but as the property is situated far away from S.T.Depo and Baroda Station, the same was not so used as Dharamshala. It was also stated that the trust have carried out the valuation report on the said land, and in the said report, the value of the property comes to Rs.10,51,000/- (dated 29.1.2002). The said report was also annexed along with the application.

3.3 In view of the said application, the Joint Charity Commissioner passed an order dated 17.12.2002 to publish an advertisement in the newspaper as per the draft given by him inviting offers for the sale of said property in question, and for that purpose upset price was fixed at Rs.12,51,000/-. Pursuant to the aforesaid order, advertisement was published on 19.12.2002 in local newspaper "Loksatta Jansatta - Baroda Edition" which is produced on page 40 of the petition i.e. in Special Civil Application No.515 of 2005.

3.4 Rameshchandra Gordhanbhai Patel - petitioner of Special Civil Application No. 515 of 2005 being interested in the property jointly submitted offer for Rs.25,00,000/- along with demand draft of Rs.2,25,000/and subsequently on 15.1.2003 gave another pay order of Rs.26,000/- being aggregate 10% of the offer.

3.4A M/s.Detostop India Pvt. Ltd. whose ultimate offer was accepted had initially given E.M.D. Rs.2,50,000/- by cheque though requirement was of draft/pay order, however ultimately the trust has waives the said condition and ultimately he offered highest price of Rs.25,61,000/and, therefore, his offer was accepted. As the revenue tribunal judgment set aside the approval of the Charity Commissioner of sale in his favour, he has filed Special Civil Application No.16716 of 2004.

3.5 Pursuant to the aforesaid advertisement, the Joint Charity Commissioner received five offers and the

Joint Charity Commissioner opened the said offers on 13.1.2003 in presence of the parties. As per the said advertisement, the following offers were received:

Sr. No.	Name of the party offered	Amount Rs.
1.	Rameshchandra Gordhanbhai Patel and Rachnaben Maheshbhai Patel (Petitioner in SCA No.515/2005)	25,00,000/-
2.	M/s.Detostop India Ltd. (EMD of Rs.2,50,000/- by cheque was given, though requirement was demand draft/pay order) (Petitioner in SCA No.16716/2004 Respondent No.3 in SCA 515/2004)	25,00,000/-
3.	Dhananjay B. Patel (EMD by cheque was given, though requirement was demand draft/pay order)	21,00,000/-
4.	Kantilal A.Patel	18,21,000/-
5.	Sigma Trisec	19,11,100/-

3.6 Thereafter the trust passed a resolution dated 19.3.2003 to accept the offer of Shri Kantilal A.Patel, who offered only Rs.18,21,000/- against which the petitioners offered Rs.25,00,000/-. It was stated that Rameshchandra Gordhanbhai Patel were ready and willing to raise their offer, if required, at the time of bidding.

3.7 From the record it appears that the offer of M/s.Detostop India Limited respondent No.3 in Special Civil Application No.515 of 2005 offered with some conditions which is submitted along with its letter. Rameshchandra Gordhanbhai Patel objected to the offer of M/s.Detostop India Limited and also objected to the resolution dated 19.3.2003 passed by the trust.

3.8 From the record it appears at this stage that Rameshchandra Gordhanbhai Patel filed an application before the Joint Charity Commissioner on 21.4.2203 with a request that as his offer is highest, his offer may be accepted. The said application is at page 54 of Special Civil Application No.16657 of 2004. The trust filed its

reply against the said application of Rameshchandra Gordhanbhai Patel on 28.4.2003 before the Charity Commissioner in which they requested that the trust has passed a resolution and also filed an application and also requested to give necessary permission to sell the property in question. Rameshchandra Gordhanbhai Patel thereafter filed further objections on 19.5.2003.

3.9 Thereafter the matter was placed before the Joint Charity Commissioner and the Joint Charity Commissioner considered the fact that the original building has been given on lease and the trust is able to get only Rs.435/per month by way of rent. The trust has also passed necessary resolution, necessary advertisement has also been issued and pursuant to that there were inter-se bidding. The Charity Commissioner has stated that in this case the respondent No.3 has given offer of Rs.25,61,000/- and, therefore, his tender/offer may be accepted. The Charity Commissioner has stated that all procedural requirements has been followed and that the trust is able to get more price than the market price as per the valuation report and the same is in the interest of the trust. The said order is very well reasoned order by which the Charity Commissioner has given approval in this behalf. The said order has been produced at page 62/A of the paper book in petition filed by the trust.

3.10 Being aggrieved and dissatisfied with the said order, Rameshchandra Gordhanbhai Patel and others filed appeal before the Gujarat Revenue Tribunal being Appeal No.53 of 2003 on 4.12.2003, and also prayed for interim stay of the impugned order by separate application.

3.11 From the record it appears that, though separate stay application was filed along with the appeal, which is on page 81 of the paper book filed on somewhere in December 2003, the tribunal did not pass any interim order of stay in this behalf.

3.11A From the record it appears that the trust, namely, respondent No.1 in tenancy appeal before the Gujarat Revenue Tribunal stated that, the trust had filed purshis before the tribunal on 29.12.2003 stating, inter-alia that they will not execute sale deed for a period of 20 days and to give a date for a final disposal of appeal. Thereafter the trust has filed an application on 8.3.2004 in which it was stated that the Charity Commissioner granted permission on 14.11.2003 in which it was directed that the sale deed has to be executed within six months, and as there is no stay and if the sale deed is not executed within six months, there will be breach

of the order of the Charity Commissioner. In view of the same it was requested that the trust may be permitted to sell the land in question during pendency of the appeal. Thereafter on 17.3.2004 the petitioner also filed another purshis before the tribunal stating that it has to execute the order passed by the Jt.Charity Commissioner dated 14.11.2003. It has also filed application on 22.4.2004 and thereafter it was stated that the trust has sold the property on 6.5.2004 in question to M/s.Detostop India Pvt.Ltd. after receiving full consideration.

3.12 From the record it appears that thereafter the Gujarat Revenue Tribunal (hereinafter referred to as "tribunal") heard the matter and after considering the facts and circumstances of the case and ultimately by its order dated 8.11.2004 pleased to partly allowed the appeal filed by Rameshchandra Gordhanbhai Patel and pleased to quash and set aside the approval granted by the Charity Commissioner in this behalf.

3.13 Being aggrieved and dissatisfied with the said order of the tribunal, the trust preferred Special Civil Application No.16657 of 2004 before this Court somewhere on 14th December, 2004, has challenged the order of tribunal.

3.14 From the record it appears that M/s.Detostop India Ltd. whose offer was accepted by the trust preferred Special Civil Application No.16716 of 2004 before this Court challenging the order of the tribunal somewhere on 15th December, 2004.

3.15 From the record it appears that Rameshchandra Gordhanbhai Patel, who had also given offer in connection with the property in question preferred Special Civil Application No. 515 of 2005 has also challenged the order of the tribunal dated 25.10.2004 (communicated on 8.11.2004) only to the extent thereby the tribunal rejected the prayer for accepting offer of the tribunal and further be pleased to direct the respondent No.1 trust to accept the offer of the petitioner for Rs.25,61,000/in respect of the property in question. The said petition was filed on 17.1.2005.

3.16 From the record it appears that though the offer of M/s.Detostop India Pvt.Ltd. - respondent No.3 in SCA No.515 of 2005 was accepted, however, he has stated that ultimately sale deed may be executed between the trust and M/s.Parshwa Realty Pvt. Ltd. - respondent No.4 in the said SCA No.515 of 2005. So ultimately sale deed has been executed by the trust in favour of respondent No.4

by accepting full consideration (i.e. Rs.25,61,000/-) on 6.5.2004.

3.17 That is how in the petition filed by Rameshchandra Gordhanbhai Patel i.e. SCA No.515 of 2005, they have made trustees of the trust Ghanchi Harilal Girdharlal Public Trust respondent No.1, Jt.Charity Commissioner respondent No.2, M/s.Detostop India Ltd. respondent No.3 and M/s.Parshwa Realty Pvt. Ltd respondent No.4, and though these matters have bee heard together, for the sake of convenience and brevity, I will consider respective parties as petitioner and respondents as described in SCA No.515 of 2005. In view of the same, first of all, I will consider the submissions of Mr.R.D.Dave, learned advocate appearing on behalf of petitioner - Rameshchandra Gordhanbhai Patel and others, who has also assailed the order of Jt.Charity Commissioner as well as the tribunal so far as the same is against them.

4. Submission of Mr.R.D.Dave, learned Advocate on behalf of Rameshchandra Gordhanbhai Patel:-

4.1 The petitioners supports order passed by tribunal setting aside order of the Joint Charity Commissioner, however, he is aggrieved by not accepting offer of the petitioners though there is substantial compliance of conditions as the petitioners submitted short fall in EMD on 15.1.2003 whereas the last date of accepting the offer was 13.1.2003.

4.2 The Joint Charity Commissioner in his order dated 14.11.2003 specifically directed that his order of granting permission to sell in favour of the trust is subject to appeal which may be filed under sec.36(3) of the Bombay Public Trust Act. Sec.36(4) of the said Act provides that decision of Charity Commissioner shall, subject to provision of sub-section (3) be final. Meaning thereby, the statute itself provides that such division of Charity Commissioner under sub-section (1) does not become final until appeal is decided under sub-section (3) by Gujarat Revenue Tribunal. Meaning thereby, so long as appeal is pending before tribunal, the trust cannot give effect to the order passed by Joint Charity Commissioner and cannot transfer the property of the trust so as to make appeal infructuous.

4.3 It was submitted that the offer of M/s.Detostop India Ltd. was not accompanied with Earnest Money Deposit (EMD) as required in the tender advertisement as a condition for making the offer. This condition is

mandatory and eligibility condition for making offer. Non compliance thereof would make the offer ineligible and permission for transfer of property to such ineligible person would be void-ab-initio.

4.4 In support of the same, the learned advocate has relied upon the decision in the case of Monarch Infrastructure Pvt. Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and others reported in AIR 2000 SC 2272, particularly paras 12, 13 and 14 which reads as under:

4.4A 12. If we bear these principles in mind, the High Court is justified in setting aside the award of contract in favour of M/s.Monarch Infrastructure (P) Ltd. because it had not fulfilled the conditions relating to Clause 6(a) of the Tender Notice but the same was deleted subsequent to the last date of acceptance of tenders. If that is so, the arguments advanced on behalf of M/s.Konark Infrastructure (P) Ltd. in regard to allegation of mala fides of the Commissioner of the Municipal Corporation in showing special favour to M/s.Monarch Infrastructure (P) Ltd. or the other contentions raised in the High Court and reiterated before us are insignificant because the High Court had set aside the award made in favour of M/s.Monarch Infrastructure (P) Ltd. The High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena it is like changing the rules of the game after it had began and, therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process of tender was the only alternative permissible. Therefore, we find that the course adopted by the High Court in the circumstances is justified because by reason of deletion of a particular condition the wider net will be permissible and a larger participation or more attractives bids could be offered.

4.4B 13. Now it is necessary to consider the case of Ramachand Mahadev Rao. One of the conditions to make offer is regarding the earnest money deposit for a sum of Rs.1.70 crores in the form of crossed Demand Draft/Pay Order or Cash. Ramachand Mahadev Rao got prepared a cheque for Rs.1.70 crores as required from the bank and submitted the tender just before the expiry of the time on April 19, 2000. He further alleges

that in haste and confusion he misplaced the Demand Draft and was in a wrong impression that a mere photocopy of the draft duly notarised will be sufficient and, therefore, he submitted photocopy of the Demand Draft along with other relevant documents. The conditions of the "Notice Inviting Tender" is that the same should be accompanied by a Demand Draft/pay order or cash and in no other form. It is clear from the statement made by him as to in what manner he could gather an impression that a photocopy of the Demand Draft duly notarised would be sufficient nor it could be said that it is naive to accept a mere statement that Demand Draft for a sum of Rs.1.70 crores obtained for the purpose of submitting the same along with the tender documents could be misplaced in the manner suggested in the application. Therefore, the Municipal Corporation is justified in rejecting the tender offer made by Ramchand Mahadev Rao as not fulfilling the conditions of the Tender Notice.

4.4C 14. Now we will turn to the last question formulated by us. The High Court had directed the commencement of new tender process subject to such terms and conditions, which will be prescribed by the Municipal Corporation. New terms and conditions have been prescribed apparently bearing in mind the nature of contract, which is only collection of octroi as an agent and depositing the same with the Corporation. In addition, earnest money and the performance of bank guarantee are insisted upon; collection of octroi have to be made on day to day basis and payment must be made on weekly basis entailing, in case of default, cancellation of the contract. We cannot say whether these conditions are better than what were prescribed earlier for in such matters the authority calling for tenders is the best Judge. We do not think that we should intercede to restore status quo ante the conditions arising in Clauses 6(a) and 6(b) of the Tender Booket and bid offered much earlier by M/s.Konark Infrastructure (P) Ltd. should be accepted, for it filed a writ petition, which was allowed with direction for calling for fresh tenders. Public interest in the present case would be definitely served by reason of allowing the tender process to be completed by accepting the higher offer made by M/s.Monarch

Infrastructure (P) Ltd. subject to raising its bid to Rs.42 crores matching with that of Ramchand Mahadeo Rao, though invalid, for Rs.41,51,00,000/- for the period of 11 months which he is willing to raise to Rs.42 crores. We are not allowing M/s.Konark Infrastructure (P) Ltd. or M/s. Jai Krishna Infrastructure such an opportunity as they had made lower bids."

4.5 It was further submitted that since the order of the Charity Commissioner is conditional and subject to division in appeal, underlined principles of Section 7 of Contract Act would be applicable. Permission for sale is conditional therefore unless and until such condition is fulfilled permission does not become final. Therefore, the parties and trust are bound by decision in appeal.

4.6 The learned advocate has relied upon another decision in the case of Haridwar Singh Vs. Bagun Sumbrui and others reported in AIR 1972 SC 1242, particularly para 8 on page 1245 which reads as under:

4.6A "In this case, it is not the want of communication of the confirmation by the Government to the appellant that really stands in the way of there being a concluded contract, but rather the want of confirmation by the Government of the conditional acceptance by the Divisional Forest Officer. The appellant's bid was for Rs.92,001/-. The acceptance of the bid by the Divisional Forest Officer was, therefore, subject to confirmation by Government. The proceedings of the Minister dated November 27, 1970, would show that he did not confirm the acceptance of the offer by the Divisional Forest Officer. What the Minister did was not to confirm the acceptance made by the Divisional Forest Officer, but to accept the offer made by the appellant in his communication dated October 26, 1970, that he would take the coup for the reserved price of Rs.95,000/-. There was, therefore, no confirmation of the acceptance of the bid to take the coup in settlement for the amount of Rs.92,001/-. If the offer that was accepted was the offer contained in the communication of the appellant dated October 26, 1970, we do not think that there was any communication of the acceptance of that offer to the appellant. The telegram sent to the Conservator of Forest, Hazaribaug, by the Government on November 28, 1970, cannot be considered as a communication of

the acceptance of that offer to the appellant. The acceptance of the offer was not even put in the course of transmission to the appellant; and so even assuming that an acceptance need not come to the knowledge of the offerer, the appellant cannot contend that there was a concluded contract on the basis of his offer contained in his communication dated October 26, 1970, as the acceptance of that offer was not put in the course of transmission. Quite apart from that, the appellant himself revoked the offer made by him on October 26, 1970, by his letter dated November 3, 1970, in which he stated that the coup may be settled upon him at the highest bid made by him in the auction. We are, therefore, of the opinion that there was no concluded contract between the appellant and the Government."

4.7 It was further submitted that the sale deed dated 6.5.2004 executed by trust in favour of respondent No.4 during pendency of appeal before tribunal is void for the following reasons:-

4.7A (a) Respondent No.4 did not make any offer pursuant to advertisement and therefore sale deed cannot be executed in favour of respondent No.4 by trust.

4.7B (b) Offer of the respondent No.3 confirming party is held to be invalid by tribunal. Moreover there is no provision for nomination in the tender condition or in advertisement. Therefore, in absence of specific provision, trust has no authority to execute sale deed in favour of respondent No.4.

4.7C (c) The trust has executed sale deed despite giving clear assurance to the tribunal not to transfer the property, however, without payment of full consideration, the trustees have hurriedly executed the sale deed by stating incorrect and false statement in the sale deed. That Charity Commissioner granted permission by order dated 14.11.2003 to sell the property either to respondent No.3 the confirming party or anybody nominated by him. No such permission is granted in order of Commissioner. Thus, the trustees in collusion with respondent No.3 and 4 have committed fraud in disposal of property of the trust. Therefore, the sale deed which is not

executed as per Section 36 of the Act, deserves to be set aside pursuant to order of the tribunal. Shrewdness to overreach legal process should be put down as held by this Court in case of Bhupatlal Govindji Vs. Bhanumati Dayalal reported in 1983 GLH 362, particularly para 8 on page 366 the Hon'ble Court has observed like this:

4.7D ".... An appeal is a continuation of the suit and if any one takes advantage of the Court's procedure and changes the situation to the material disadvantage of the other side, in the meantime and if ultimately, the action which facilitated the commission of the act on the part of the person is held unauthorised, the Court should put the party in the position in which it would have been, before that vacuum or interregnum created by the procedural delays."

4.7E (d) Transfer of property without prior sanction of Charity Commissioner under sec.36(1) of the Act is void-ab-initio and the aggrieved party is not required to go for declaration for nullity of contract before the Civil Court. (Hussainmiya Vs. Habibshah reported in 26(2) GLR 928 - para 8).

4.7F The learned advocate for petitioner has relied upon Division Bench judgment of this Court in the case of Huseinmiya Safimiya Vs. Habibsha Hasamsha Fakir reported in 26(2) GLR 928 where in para 8 on page 930 the Hon'ble Court has observed like this:

".... It must be kept in view that as per sec.36 of the Bombay Public Trusts Act, no immovable property of a public trust can be alienated in favour of any one by a trustee without express permission of the Charity Commissioner. And if such alienation is made, it shall be invalid. Admittedly, no such permission was taken in the present case. Consequently, the transaction entered into by defendant No.2 in favour of the present appellant remained null and void and not binding on the trust. It was not necessary for the trustees to sue for getting such a declaration and then to file the suit for possession."

4.7G (e) The transaction of sale deed during pendency of appeal before the tribunal is also

governed by Section 52 of Transfer of Property Act. Therefore, any transfer made during pendency of appeal is governed by decision in appeal. When the Tribunal has already set aside the order of the Commissioner, the sale deed becomes void and illegal therefore also it requires to be set aside.

4.8 The learned advocate further submitted that the petition is arising out of order passed by the tribunal therefore it is governed by Articles 226/227 of the Constitution of India. This Court has ample power and jurisdiction to do the justice by giving appropriate directions as prayed for in the petition for implementation of law. Therefore, considering the above submissions, this Court may set aside the sale made in favour of respondent No.4.

4.9 The learned advocate further stated that the petitioner has already filed an affidavit dated 10.3.2005 offering Rs.45.00 lacs for the property offered for sale which is substantially higher than the offer made by respondent No.3 and 4, therefore also the petition deserves to be allowed in favour of the petitioner.

5. Submissions On behalf of Ghanchi Harilal Girdharlal Public Trust - respondent No.1 in Special Civil Application No.515 of 2005 (as well as petitioner in SCA No.16657/2004), through their two trustees Piyushkumar Jayantilal Gandhi and Chandrakant Chimanlal Gandhi - submissions of Mr.P.M.Thakkar, learned Senior Counsel with Ms.Shaili Kapadia, learned advocate.

5.1 The learned counsel submitted that the trustees of the trust preferred an application under Sec.36 of the Act to accord sanction to sell the property in question situated at Manjalpura, Dist. Vadodara, bearing Revenue Survey No.521 and 518/2 with the tenants occupying the same. The said application was preferred in pursuance of resolution passed by the trust dated 19.1.2002 to protect the interest of the trust. As the property was being wasted and was not proving to be handy for the purpose for which the trust was created. Over and above, there are tenants in the said property and it was difficult for the trust to take possession from the tenants.

5.2 The learned counsel submitted that a report of registered valuer was called for and the registered valuer assessed the value of the property in question at Rs.10,51,000/- (Rupees Ten Lakhs Fifty One Thousand only) by a report dated 29.1.2002. A public notice was given

in a daily vernacular newspaper Loksatta in Vadodara Edition dated 19.12.2002 inviting tenders by fixing the reserved price at Rs.10,51,000/-. As per the terms and conditions the interested parties had to submit their offer through Registered Post A.D. in a sealed envelope along with 10% deposit by way of Demand Draft drawn in name of trust. It was also clarified that any person having any objection regarding the sale of the trust property, should file the same on or before 13.1.2003. Objection pursuant to the public notice was raised by one of the tenants. The tenant was heard by the Joint Charity Commissioner and ultimately the tenders of five parties were opened. One of the parties who bidded are the petitioners (Rameshchandra Gordhanbhai Patel).

5.3 Rameshchandra Gordhanbhai Patel and one M/s.Detastop India Pvt.Ltd. offered Rs.25.00 lacs for the property. As per the terms and conditions 10% of the deposit was to be paid by way of Demand Draft drawn in the name of the trust. However, instead of Demand Draft, M/s.Detostop India Pvt.Ltd. - respondent No.3 in the petition tendered a cheque of the amount of Rs.2.50 lacs (i.e. 10% of Rs.25.00 lacs) which got realised and the amount of the cheque got credited in the account of the trust. So far as Rameshchandra Gordhanbhai Patel and other petitioners are concerned, they had paid amount of Rs.2,25,000/- by way of a pay order and the amount was falling short by Rs.25,000/-. However, subsequently they tried to rectify their mistake by tendering another pay order of Rs.26,000/-, but, by that time, the fixed date for accepting the same had already passed i.e. 15.1.2003.

5.4 As Rameschandra Gordhanbhai Patel as well as the respondent No.3 M/s.Deto Stop India Pvt. Ltd. offered equal amount, both the parties were asked to undergo inter se bidding, and it was decided that whoever pays more, the trust would sell the property to that particular party. Rameschandra G.Patel made it very clear, despite giving them due opportunity that they were not ready and willing to increase their offer even by one rupee, whereas, the respondent No.3 Deto Stop India Pvt. Ltd. were ready and willing to pay Rs.61,000/- more and that is how , the offer of respondent No.3 Deto Stop of Rs.25,61,000/- (Rupees Twenty Five Lakhs Sixty One Thousand only) being the highest amongst the other bidders was accepted.

5.5 It was submitted that the paramount and predominant consideration for the trust was to secure the maximum price of the property. Obviously, since

respondent No.3 - Deto Stop India Pvt.Ltd. was ready and willing to offer Rs.61,000/- more than what the Rameshchandra G.Patel were ready and willing to offer, the offer of M/s.Deto Stop India Pvt. Ltd. was accepted as the highest bidder which was not liked by Rameshchandra G.Patel and Rameshchandra G.Patel tried their best to thwart and jeopardise the entire auction proceedings be even tendering his objection before the Charity Commissioner in the form of some communication dated 21.4.2003. The learned Joint Charity Commissioner after giving opportunity to all the parties including the petitioners, ultimately passed order containing cogent and convincing reasons and accorded sanction to sell the property for the amount of Rs.25,61,000/- to the respondent No.3 Deto Stop India Pvt. Ltd.

5.6 Thereafter Shri Rameschandra G.Patel preferred an appeal under sec.36(3) of the Act and challenged the order of the Joint Charity Commissioner accorded sanction to sell the property in favour of respondent No.3 - Deto Stop India Pvt. Ltd. Though the tribunal has quashed and set aside the order of Joint Charity Commissioner accorded sanction to sell the property to respondent No.3 Deto Stop India Pvt. Ltd. which has been challenged by trust preferring SCA No.16657/2004 which is pending before this Court for hearing. The tribunal did not accept the submissions of Rameschandra G.Patel so far as their prayer to ask the trust to sell the property in their favour by executing necessary sale deed.

5.7 The learned counsel appearing on behalf of the trust has made further following legal submissions:

5.8 The petition of the present nature is not maintainable in the eye of law, more particularly, when the petitioner is invoking extra-ordinary jurisdiction of this Court under Article 226 and/or 227 of the Constitution of India, without adducing sufficient proof about infringement or violation of any fundamental right much less any legal right.

5.9 The petitioners have no locus standi to prefer petition of the present nature considering the relief which they have prayed for, more particularly, when they are praying for a writ, order or direction to set aside the sale deed executed by the trust in favour of M/s.Parshwa Realty Pvt. Ltd. in respect with the property in question.

5.10 The petition deserves to be dismissed solely on the ground that the petitioner cannot challenge the

legality, validity of the sale deed in question by preferring a Writ Petition and that too while challenging the order passed by the tribunal. The legality and validity of the sale deed in question can be challenged before the Civil Court and the petitioners have already preferred Regular Civil Suit No.620 of 2004 in the Court of Civil Judge (S.D.), Vadodara, seeking declaration that the sale deed in question is a nullity and the same should be set aside. Having once availed of the only remedy available, this petition is not maintainable.

5.11 It is also important to note that the tribunal has held very categorically that the petitioners have no right to claim the property. Therefore, the only question would be whether there is any act on the part of the trust whereby it can be said that the trust failed to protect its interest by disposing of the property at the price less than the market value of the property. On the contrary, trust has been able to secure almost double the price than what was assessed by the valuer appointed by the trust. It is also important to mention that value which was assessed was about Rs.10.51,000/-, whereas the trust received almost more than double i.e. Rs.25,61,000/-.

5.12 It was further stated that by the learned counsel that, assuming for the moment, without admitting that there is some infraction of law so far as Section 36 is concerned, still the object behind enacting sec.36 is to protect the interest of the trust, and in the present case, the interest of the trust is very well protected. If the petitioners have their own grievances to redress, then they will have to establish as to whether they have any right to claim the property and get the sale deed in their favour through the trust. This part of the relief has been denied by the tribunal, and ultimately in the facts and circumstances of the case, if the petitioners cannot be sold this particular property of the trust then all other reliefs which the petitioners have prayed would fail into insignificance.

5.13 The learned counsel for the petitioner first of all addressed this Court on interpretation of Sec.36 of the Bombay Public Trusts Act which reads as under:

"S.36 Alienation of immovable property of public trust:

(1) Notwithstanding anything contained in the instrument of trust -

(a) no sale, mortgage, exchange or

gift of any immovable property, and

(b) no lease for a period exceeding ten years in the case of agricultural land or for a period exceeding three years in the case of non-agricultural land or a building belonging to a public trust,

shall be valid without the previous sanction of the Charity Commissioner.

(2) The decision of the Charity Commissioner under sub-section (1) shall be communicated to the trustees and shall be published in such manner as may be prescribed.

(3) Any person aggrieved by such division may appeal to the Gujarat Revenue Tribunal within thirty days from the date of its publication.

(4) Such decision shall, subject to the provisions of sub-section (3) be final."

5.14 On interpretation of sec.36 of the Act, the learned counsel has relied upon the decision of this Court in the case of Thakorebhai Gangaram Vs. Ramanlal Maganlal Reshamwala reported in 1993(1) GLH 473 particularly para 4 & 5.

5.14A " .... Before the Charity Commissioner sanctions alienation of trust property he has to apply his mind to following material questions, namely (i) whether there is a compelling necessity to justify the alienation in question? (ii) whether the proposed alienation is fair and just? (iii) whether the proposed alienation, in any way, adversely affects the interest of the trust?

5.14B "Keeping the aforesaid three considerations in mind the Charity Commissioner is required to examine the matter and after allowing the parties with ample opportunity to lead evidence and to satisfy as to how the need to alienate the property of the trust is arisen and whether it would act in the interest of trust or not, he would proceed to grant or refuse the sanction. Number of factors, such as, financial position of the trust, income which the property is fetching or would continue to fetch compared to the income which the property would bring to the trust if

> the property is disposed of, the liabilities of trust, income of the trust, and last but not the least, the price at which the property is being sold are required to be taken into account. This is not the exhaustive list of factors to be taken into account. Over and above these factors, many other relevant and genuine factors may need consideration of the Charity Commissioner. However, after taking all these relevant factors into consideration and after hearing both the parties if the Charity Commissioner sanctions the alienation of the property question is as to whether such opinion should be upset in appeal on grounds which do not materially affect the satisfaction reached by the Charity Commissioner in whom power to grant sanction is vested. In my opinion, the primary power to grant sanction is vested by the Legislature advisedly in Charity Commissioner. Charity Commissioner should exercise such power justly and fairly and after taking into consideration the relevant factors as stated hereinabove and once such sanction is granted by the Charity Commissioner, in my opinion, it would be unjust to upset such sanction in appeal on grounds which do not materially affect the satisfaction reached by the Charity Commissioner. The appellate authority while exercising powers under sec.36(3) could not take upon itself the task of substituting its decision to that of the Charity Commissioner when the Legislature has thought it fit to invest the power in the Charity Commissioner."

5.15 The trust has not committed any fraud or illegality in transferring the property in favour of respondent No.4 M/s.Parshwa Realty. There is no procedural illegality.

5.16 Thereafter the learned counsel for the respondent trust has invited my attention on interpretation of tender and acceptance of tenders by the public trustees. It is his case that the trustees have acted fairly and with commercial sagacity with an intention to have a maximum price of the property in question. In support of the aforesaid contention, the learned counsel has relied upon the following authorities:

5.17 M/s.Poddar Steel Corporation Vs. M/s. Ganesh Engg. Works and Others reported in AIR 1991 SC 1579 para 6 & 8.

5.17A "6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank the clause no. 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in G.J. Fernandez v. State of Karnataka & Ors., [1990] 2 SCC 488 : (AIR 1990 SC 958), a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India, [1979] 3 SCC 489 : (AIR 1979 SC 1628), but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the Court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses the present case belongs.

5.17B 8. In the present case the certified cheque of the Union Bank of India drawn on its own branch must be treated as sufficient for the purpose of achieving the object of the condition and the Tender Committee took the abundant caution by a further verification from the bank. In this situation it is not correct to hold that the Diesel Locomotive Works had no authority to waive the technical literal compliance of clause 6, specially when it was in its interest of not to reject the said bid which was the highest. We, therefore, set aside the impugned judgment and dismiss the writ petition of the respondent no. 1 filed before the High Court. The appeal is accordingly allowed with costs throughout."

5.18 Food Corporation of India vs. M/s.Kamdhenu Cattle Feed Industries reported in AIR 1993 SC 1601 para 10.

5.18A "10. From the above, it is clear that even though the highest tenderer can claim no right to have his tender accepted, there being a power while inviting tenders to reject all the tenders, yet the power to reject all the tenders cannot be exercised arbitrarily and must depend for its validity on the existence of cogent reasons for such action. The object of inviting tenders for disposal of a commodity is to procure the highest price while giving equal opportunity to all the intending bidders to compete. Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund. Accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price. The inadequacy may be for several reasons known in the commercial field. Inadequacy of the price quoted in the highest tender would be question of fact in each case. Retaining the option to accept the highest tender, in case the negotiations do not yield a significantly higher offer would be fair to the tenderers besides protecting the public interest. A procedure wherein resort is had to negotiations with the tenderers for obtaining a significantly higher bid during the period when the offers in the tenders remain open for acceptance and

rejection of the tenders only in the event of a significant higher bid being obtained during negotiations would ordinarily satisfy this requirement. This procedure involves giving due weight to the legitimate expectation of the highest bidder to have his tender accepted unless outbid by a higher offer, in which case acceptance of the highest offer within the time the offers remain open would be a reasonable exercise of power for public good."

5.19 M/s.Jyothi Krishna Engineers Vs. State Bank of Hyderabad reported in AIR 1993 AP 327 para 10, 13 & 15.

5.19A "... The terms and conditions of tender notice can be classified into two. One is essential conditions of eligibility and the other is ancillary or subsidiary to the main object to be achieved by the condition. So far as conditions of eligibility are concerned, they cannot be waived and must be strictly complied with, while the other conditions which are ancillary or subsidiary need not be literally complied with. The form of making earnest money deposit is not an essential eligible condition. It is only ancillary or subsidiary condition. It is meant for the purpose of making the contractors start the work after giving the contract to him. Any deficiency therein can be waived and the tenderer, if he is the lowest shall not be pin-down for literal compliance of the said condition. Consequently, the rejection of tender only on the ground that the earnest money deposit required to be made pursuant to the conditions of invitation to tender was made not by way of demand draft, but by way of "term deposit receipt" was improper.

It cannot be said that in such a case court cannot grant any mandamus directing the respondent to accept the tender of the petitioner and at best, the court can only direct the authorities to consider and decide the matter in the light of relevant conditions. The tender having a lowest bid having been rejected merely on technical ground, a mandamus to accept the same can be issued."

6. From the record it appears that, originally respondent No.3 Deto Stop India Pvt.Ltd. had offered the property in question, and when the offer to be accepted

ultimately the property in question was purchased by M/s.Parshwa Realty Pvt.Ltd. (a nominee of respondent No.3) - respondent No.4 herein. In view of the same, the contention of M/s.Deto Stop India Pvt.Ltd. for whom Mr.M.I.Merchant, learned advocate appears, and the contention of M/s.Parshwa Realty Pvt.Ltd. for which Mr.J.B.Pardiwala, learned advocate appears.

7. Contention of Mr.M.I.Merchant, learned advocate and Mr.J.B.Pardiwala, learned advocate appearing on behalf of respective respondents i.e. respondents No.3 and 4 in SCA No.515 of 2005.

7.1 The petition of the present nature is not maintainable in the eye of law, more particularly when the petitioner is invoking extra-ordinary jurisdiction of this Court under Article 226 and/or 227 of the Constitution of India without adducing sufficient proof about infringement or violation of any fundamental right much less any legal right. Rameshchandra G.Patel has no locus standi to prefer petition of the present nature considering the relief which they have prayed for, more particularly when they are praying for a writ, order or direction to set aside the sale deed executed by the trust in favour of M/s.Parshwa Realty Pvt. Ltd. in respect with the property in question.

7.2 Rameshchandra G.Patel and other petitioners are aggrieved by the fact that the trust has transferred the property in question by executing a sale deed in favour of M/s.Parshwa Realty Pvt.Ltd. though M/s.Parshwa Realty Pvt.Ltd. never bidded in the auction and in collusion with respondent No.3 trust executed sale deed without any prior permission of the Charity Commissioner. According to the petitioners the sale deed in question is a nullity and it should be declared as quashed and set aside. It is very surprising to note that a relief of this nature to set aside the sale deed is being prayed for in a petition invoking extra-ordinary powers of this Court.

7.3 The petition deserves to be dismissed solely on the ground of the fact that the petitioners have challenged the legality, validity of the sale deed in question by preferring Regular Civil Suit No.620 of 2004 in the court of Civil Judge (S.D.), Vadodara, seeking declaration that the sale deed in question is a nullity and the same should be set aside. As a matter of fact it cannot be said that the petitioners have already availed of an alternative remedy, because filing of civil suit in the Civil Court, and seeking declaration about the legality and validity of sale deed can be done only by

the Civil Court, and not by this Court in exercise of its extra-ordinary powers.

7.4 It is well settled that under Articles 226/227 of the Constitution of India, the power of High Court to issue appropriate writ is discretionary. The relief under Article 226 and 227 of the Constitution of India, cannot be claimed as of right. In a given case, this Court may not grant the relief to the petitioner if no serious injustice is caused to him even if the action complained of may not be found to be in strict conformity with law. Jurisdiction exercised by the writ court is an equitable jurisdiction and if, ultimately, by the impugned decision, there has not been any material injustice, the writ court may be well justified in refusing to interfere simply because there has been some infraction of law.

7.5 The learned counsel submitted that the Courts of equity may, and frequently do, go much further, both to give and withhold relief in furtherance of the public interest, then they are accustomed to go where the only private interests are involved. One of the grounds for refusing relief is that there has been a long and inordinate delay on the part of the petitioners in approaching this Court pray for the appropriate reliefs.

7.6 The learned counsel further submitted that sale deed in question said to have been executed by the trust in favour of M/s.Parshwa Realty Pvt.Ltd is dated 6.5.2004. The decision rendered by the tribunal setting aside the permission granted by the Joint Charity Commissioner to the trust is dated 25.10.2004(communicated on 8.11.2004). The present petition is preferred in January 2005. Now so far as the relief which has been prayed for and which directly affects M/s.Parshwa Realty Pvt. Ltd. is concerned, must be considered from the point of view that the petitioners knew very well that the trust has transferred the property in favour of M/s.Parshwa Realty Pvt. Ltd., and Parshwa Realty Pvt. Ltd. has also started developing the property since May 2004, still no steps were taken by the petitioners either before the tribunal before whom the appeal was pending nor did the petitioner think fit to approach this Court seeking appropriate relief and the petitioners have directly or indirectly permitted M/s.Parshwa Realty Pvt. Ltd. who bought the property in good faith bonafidely by paying due consideration to develop the property, raise the construction on the property and dispose of the flats to different persons who are now occupying the flats.

7.7 It was submitted that therefore from May 2004 uptil January 2005, the petitioners did not take any steps to restrain M/s.Parshwa Realty Pvt. Ltd. The equities are now heavily in favour of M/s.Parshwa Realty Pvt. Ltd. who has obtained the property from the trust bonafidely in good faith and has developed the same by investing lacs of rupees, and not only that, but different people have now started occupying the flats. In this set of facts and circumstances, when the petitioners have failed to explain as to why they did not take steps at the earliest, the relief as prayed for should not be granted only on the ground of delay laches.

7.8 The learned counsel has relied upon further affidavit dated 31.3.2005 of respondent No.4 in which it was stated that number of flats which has been constructed by respondent No.4 and disposed of so far in this behalf. The details have been given on page 148 regarding Block No.A/1, Block No.A/2, Block No.A/3, Block No.A/4, Block No.A/5&6 and Block Nos.A/7&8 which have been disposed of to various parties also. The details have also been given in para 4 also and even the photographs have been produced on page 152, 153 and 154 are also put it on record.

7.9 In support of the aforesaid contention, the learned advocate for the respondent No.4 has relied upon the following authorities:

7.10 The learned advocate has relied upon the Division Bench judgment of this Court in the case of Saurashtra Paper and Board Mill Vs. State reported in 33(2) GLR 871 para 12, 14, 15. The learned advocate has relied upon this judgment on the ground that when the petitioner in SCA No.515 of 2005 has prayed for certain reliefs, the said relief is in equitable relief and this Court while exercising powers under Articles 226 and 227 of the Constitution of India may decline to exercise the jurisdiction on the ground that the relief claimed by the petitioner is not equitable relief and this Court while exercising powers under Articles 226 and 227 of the Constitution of India, has a discretionary jurisdiction, although founded on legal injury. It is perfectly open for the Court, exercising the said power not to grant equitable relief as per public interest dictates and equity projects because the respondents have already constructed buildings on the land in question which has been purchased by the trust.

7.10A From the record it appears that in para 12 of the said judgment, the Division Bench has observed that

remedy under Article 226 of the Constitution of India is discretionary in nature and in a given case, even if some action or order challenged in the petition is found to be illegal and invalid, the High Court while exercising its extraordinary jurisdiction thereunder, can refuse to upset it with a view to doing substantial justice between the parties.

7.10B The learned advocate has also relied upon para 14 of the said judgment where this Court also considered some of the judgments of this Court as well as Hon'ble Apex Court, particularly the observations of the Hon'ble Apex in the case of Kewal Krishna Puri and another Vs. State of Punjab and others reported in AIR 1980 SC 1008 which has been quoted by the Division Bench in para 14 on page 881 and ultimately in para 15 the Division Bench has observed like this:

7.10C "It has been rightly observed that legal formulations cannot be enforced divorced from the realities of the fact situation of the case. While administering law it is to be tampered with equity and if the equitable situation demands after setting right the legal formulations not to take it to the logical end, the High Court would be failing in its duty if it does not notice equitable considerations and mould the final order in exercise of its extraordinary jurisdiction. Any other approach would render the High Court a normal Court of Appeal, which it is not."

7.11 The learned counsel further relied upon another decision in the case of Kamalsha Gulzarsha and another Vs. Charity Commissioner reported in 1993(2) GLR 1343 para 6.

7.11A The aforesaid decision is relied upon for the proposition of law that considering the nature of reliefs prayed for by the petitioner, more particularly the relief on declaration that the sale deed executed by the trust in favour of respondent no.4 is in flagrant disregard of the provision of sec.36 and the same is null and void can be adjudicated upon and the necessary relief can be granted only in a civil suit by the Civil Court after leading proper evidence in this regard. In this reported decision also after reproducing the prayers asked for in the said suit in para 2 of the judgment, the Division Bench proceeded to observe in para 6 of the decision that:

7.11B "Under s.36 of the Act the Charity Commissioner could have approached Gujarat Revenue Tribunal for cancellation of the sanction already accorded by his office. But, it requires to be pertinently noticed, as has been done by the learned single Judge, that the other prayers, which are material and substantial, but considering the prayers which are material and substantial, could not have been granted by the Gujarat Revenue Tribunal while exercising its jurisdiction under sec.36(3) of the Act."

7.12 The submission is that if the reliefs which have been prayed for in the petition while challenging the order of the tribunal as an appellate authority if those reliefs could not have been granted by the tribunal as an appellate authority, whether this Court in exercise of its powers under Article 226 and/or 227 would grant such a relief. If the order of the tribunal which is under challenge is perused minutely, then it merely set aside the order of the Charity Commissioner granting sanction to the trust to execute the sale deed in favour of Deto Stop. Nothing further has been observed by the tribunal. Most importantly the tribunal has recorded a finding that even the petitioners are not entitled to have the property not at this stage. Very surprisingly the petitioners have decided to challenge the part of the order of the tribunal and supports some part of the order of the tribunal. So far as the findings of the tribunal as regards legal necessity to dispose of the property is concerned, the petitioners have submitted that the finding is bad in law and the tribunal ought to have passed an order directing the trust to transfer the property in favour of the petitioner. This is not permissible as the petitioners are trying to take advantage of their own wrong.

7.13 The learned counsel has also made further submissions in reply to the contention of when petitioner made further submissions in this behalf.

7.14 The submission of the petitioners that the order of the Joint Charity Commissioner dated 14.11.2003 does not become final until appeal is decided under sub-section (3) by Gujarat Revenue Tribunal is without any substance and misleading. The entire reading of Section 36 of the Act by the petitioners is nothing but absolute wrong interpretation and construction of the section. Firstly section 36(3) merely provides that if any person is aggrieved by the decision of the Charity Commissioner then that person may appeal to the Gujarat

Revenue Tribunal within 30 days from the dates of its publication. The plain reading of Section 36(3) of the Act would show that it merely provides for an appeal which can be preferred by any person aggrieved. Section 36(4) provides that such decision i.e. the decision of the Charity Commissioner shall be final subject to the provisions of sub-section (3) of the Act.

7.15 The learned advocate submitted that the interpretation put forward by the petitioners is that the order of the Charity Commissioner does not become final until appeal is decided and therefore so long as appeal is pending before tribunal the trust cannot give effect to the order passed by the Charity Commissioner and cannot transfer the property. This is completed misreading of the section. On the contrary the true and the correct interpretation of sec.36(4) of the Act is that if no appeal is preferred against the order or decision of the Charity Commissioner then such order of the Charity Commissioner be treated as final. This can be the only rationale, true and correct interpretation of the section. One fails to understand from where the petitioners read that as long as appeal is pending before the tribunal, the trust cannot give effect to the order by Charity Commissioner and who has a right to prefer an appeal under sec.36(3) of the Act has also got a right to pray before the tribunal to suspend the operation of the order appealed. If the tribunal as an appellate authority has not suspended the operation of the order challenged in appeal then mere pendency of appeal cannot be treated as suspension of the operation of the order of the Charity Commissioner. Therefore, Section 36(4) is very clear that the decision of the Charity Commissioner will be final unless an appeal is preferred i.e. subject to the right of any aggrieved person to prefer an appeal. There is no substance in this submission of the petitioners.

7.16 The submission of the petitioners that the offer of M/s.Detostop India Ltd. was not accompanied with EMD as required in the tender advertisement and therefore the non compliance of the mandatory condition would render the transfer of property to such ineligible person would be void ab initio is without any substance and merits. Petitioners have relied upon decision of the Hon'ble Supreme Court reported in AIR 2000 SC 2272 in the case of Monarch Infrastructure Pvt. Ltd (supra). This decision has been relied upon by the petitioners to canvass the proposition of law that if any terms or conditions of the tender is deleted after the bidders enter into the arena is like changing the rules of the game and therefore

fresh process of tender was the only alternative permissible. This decision has practically no application to the facts of the present case. Because even in the decision of the Hon'ble Supreme Court which has been relied upon by the petitioners the ratio of the judgment is that the authority calling tender is the best Judge and in the case before the Hon'ble Supreme Court the facts were that the Municipal Corporation had acted arbitrarily in considering the bid of M/s.Monarch Infrastructure Limited which did not fulfill the eligibility condition on the last date which was prescribed for the submission of the tenders. This was a case of deletion of a particular condition.

7.17 In the present case the condition to a certain extent was modified and most importantly even thereafter the petitioners were given an equal opportunity to participate in the auction bid. It was always open for the petitioners to raise their bid and succeed as the highest bidder but they never chose to raise their bid and therefore in the interest of the trust ultimately the Charity Commissioner decided to grant sanction to execute the sale deed in favour of Detostop as the highest bidder. Secondly, what weighed with the Hon'ble Supreme Court in the decision relied upon by the petitioners is the course adopted by the High Court because by reason of deletion of a particular condition the wider net will be permissible and a larger participation or more attractives bids could be offered. Here also ample opportunity was given to the petitioners when the bid amount was equal. However, in such type of cases there is always some discretion with the authority inviting tenders and it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous details, and is not entitled to waive even a technical irregularity of little or of no significance as held by the Hon'ble Supreme Court reported in AIR 1991 SC 1579 in the case of M/s. Podder Steel Corporation Vs. M/s. Ganesh Engineers and others (para 6).

7.18 The submission of the petitioners that the order of Charity Commissioner is conditional and subject to decision in appeal underlined principles of Section 7 of Contract Act would be applicable. In view of what is discussed above while dealing with the first submission of the petitioners this contention of Section 7 of Contract Act is without any substance and meritless. Once again it is submitted that the order of Charity Commissioner cannot be termed as conditional, but it is final subject to the right of any aggrieved person to

file an appeal and nothing beyond that.

7.19 The petitioners dealing with the decision relied upon by respondent No.4 in case of Saurashtra Paper and Board Mills Case 1992 (2) GLR 871 is meritless. Firstly, assuming for the moment that there is violation of mandatory statutory provision under sec.36 of the Act then how such violation has substantially prejudiced the petitioners. So far as monetary loss is concerned, the trust has been able to procure Rs.25,60,000/i.e. twice the amount of the value of the property assessed. Therefore, the infraction of law which has been complained of has not affected the public interest in any manner.

7.20 It is respectfully submitted that respondent No.4 in the affidavit in sur-rejoinder has given all the details about the development of the property and the photographs which have been annexed with the sur-rejoinder would go to show the extent of development which has taken place on the property in question.

7.21 The most important arguments of the petitioners in para 9(b) deserves to be considered. According to the petitioners the tribunal after going through records and documents and after making elaborate inquiry gave finding of facts. According to the petitioners the finding of fact that there was collusion between the trustees and respondent no.3 Detostop India Limited, and that there is no need to sell the properties by the trustees does not warrant any interference by this Court. If this Court accepts this submission then the petition of the petitioners would also fail and that is exactly what the petitioners have submitted. If the petitioners are also of the opinion that there was no legal necessity for the trust to dispose of the property then he can pray before this Court to allow his petition. Therefore the submissions of the petitioners are contrary at every stage.

7.22 The learned advocate submitted that for assailing the same the petitioner has to establish that there is an inadequacy of price and there is material irregularity. For that purpose he has also relied upon the judgment of this Court in the case of Patel Scrap Traders Vs. State of Gujarat reported in AIR 2005 Gujarat 13 particularly para 7.11(G) where this Court quoted the judgment of Hon'ble Apex Court in the case of Radhey Shyam Vs. Shyam Behari Singh reported in AIR 1971 SC 2337 and thereafter this Court observed like this:

7.22A "Rule 90 of order 21 of the Code, as amended by the Allahabad High Court, inter alia, provides that no sale shall be set aside on the ground of irregularity or even fraud unless upon the facts proved the Court is satisfied that the applicant has sustained injury by reason of such irregularity or fraud. Mere proof of a material irregularity such as the one under Rule 69 and inadequacy of price realised in such a sale, in other words injury, is. therefore, not sufficient. What has to be established is that there was not only inadequacy caused by reason of the material irregularity or fraud. A connection has thus to be established between the inadequacy of the price and the material irregularity."

7.23 It may be noted that one of the contention raised by Mr.R.D.Dave, learned advocate for the petitioner is that the original bid was given by respondent No.3 M/s.Detostop India Pvt. Ltd. After his bid was accepted, he directed the trust to execute the document in favour of respondent No.4. His contention is that this is also illegality and respondent No.4 cannot enter into contract like this. Mr.Pardiwala, learned advocate who appeared on behalf of respondent No.4 stated that once the bid is accepted and the person whose offer is accepted may direct the trust to enter into other person contract with the same trust, and therefore, there is no illegality in this behalf.

7.24 In support of the same he has relied upon the judgment of Bombay High Court in the case of Rahimtulla Lowji Damani vs. Official Assignee, Bombay reported in AIR 1935 Bombay 340, particularly page 342.

7.24A "..... In my opinion, there is nothing in this contract to entitle the vendor to insist that he is not bound to execute any conveyance except in the name of the purchaser. We are told that it has been the invariable practice in the Official Assignee's office not to execute a conveyance to anybody except the immediate purchaser. We have pressed Mr.Munshi to tell us what risk will be incurred by the Official Assignee if he executes this conveyance in the name of the sub-purchaser rather than of the purchaser, and we are not satisfied that any such risk exists. It is clear that if the conveyance were made in the name of the original purchaser, he could, five minutes later, reconvey the property to the sub-purchaser, and what advantage that course, in

> preference to a direct conveyance to the sub-purchaser, would confer upon the Official Assignee I do not know. The obvious disadvantage from the point of view of the purchaser is that the double conveyance subjects him to double stamp duty, and prevents him taking advantage of the provisions of S.28(3) Stamp Act. It seems to me that it would be a considerable hardship if purchasers from the Official Assignee are to be deprived in all cases, irrespective of any benefit which may accrue to the Official Assignee, of the advantages of that section."

7.25 So far as additional affidavit filed by Rameshchandra Gordhanbhai Patel dated 10th March, 2005, the property which is substantially higher is nothing but to mislead the court. The submission no.7 of the petitioners that they have filed an affidavit dated 10.3.2005 offering Rs.45.00lakhs for the property offered for sale which is substantially higher than the offer made by respondents No.3 and 4 is nothing but an attempt to mislead this Court in all respects and by putting forward such proposals and offers the petitioners are exhibiting complete lack of bonafides. When appropriate chance was given to the petitioners to raise their offer. The chance was not availed of and now when the property is already transferred and developed to a considerable extent an offer of Rs.45.00 lakhs is being put forward malafidely with oblique motive in mind. Such offers lacking in bonafides must be grinded to dust immediately.

8. CONCLUSION AND FINDINGS:

8.1 I have considered the facts and circumstances of the case. I have also considered the various decisions cited by the petitioner as well as respondent No.1 trust, submissions of Mr.M.I.Merchant, learned advocate appearing on behalf of the respondent No.3 and submissions of Mr.J.B.Pardiwala, learned advocate appearing on behalf of the respondent No.4.

8.2 As regards order of Charity Commissioner as well as order of tribunal, they both are in consonance with Section 36 of the Bombay Public Trusts Act as well as decision of this Court in the case of Thakorebhai Gangaram. Though it was not seriously argued whether there was a compelling necessity to justify the alienation of the property by the trust is concerned, however, to satisfy the conscience of the court, the learned Senior Counsel for the trust has invited my

attention to all these facts, and he has indicated that Dharamshala was at far away from the Baroda Station as well as S.T.Depo, and it was tenanted property, and the trust were getting only Rs.435/- as a monthly rent. So the trustees were not able to use the property in question properly commercial way and they had no income in this behalf. With a view to see that, if the property sold and whatever the amount received, if the said amount is invested, the trust can get more income in this behalf. Here in this case the trustees have therefore shown that because of this peculiar facts and circumstances of the case, they had compelling necessity to justify the property in question. The trustees have also invited my attention to the proceedings initiated by the trustees by passing the resolution, whatever filing application before the Charity Commissioner, publish advertisement and thereafter the tenders invited and the whole process of tenders which has been shown and even the valuation of property was also taken which was valued Rs.10.00 lakhs (approximately), whereas trust can able to obtain Rs.25,61,000/- which is highest offer has been accepted. In view of the same, the alienation of the property by the trust is fair, just, legal and valid. The trustees have acted very honestly and impartial manner and their conduct is consonance with commercial sagacity and reasonable in this behalf.

8.3 The trustees have also shown that in view of the fact that the property was tenanted and getting very meagre amount, thereafter they have decided to sell the property and whole process which has been shown is transparent process and the Charity Commissioner had also given approval in this behalf, and therefore, in any view of the matter, the said action of the trust for alienation of the trust property does not adversely affect the interest of the trust. On the contrary, it will enhance the object of the trust. In view of the same, the ratio decidendi of the judgment of this Court in the case of Thakorebhai Gangaram (supra) is squarely applies in this behalf, and the trustees can able to say that the entire action initiated by them is legal, just and transparent in this behalf.

8.4 It may be noted that, it is a general presumption that the person who gives land or building to public trust intends that such property should be used for the benefit of interest of the public trust forever. Section 36 deals with alienation of immovable property and it permits alienation only with the previous sanction of the Charity Commissioner.

8.5 From the record it appears that the language of sub-section (1) of Section 36 is clear and the Legislature has in no uncertain terms provided that no sale, mortgage, exchange or gift of any immovable property belonging to a public trust shall be valid without the previous permission of the Charity Commissioner. It becomes clear on a plain reading of this provision that where the Legislature intended that the transaction should be invalid ab initio, it made manifest its intention in clear and unmistakable language. The application made by the trust has been considered by the Charity Commissioner considering the paramount interest of the trust and not on the fleeting interest of the trustees or the beneficiaries. The Charity Commissioner would have, therefore, to exercise its jurisdiction by making an inquisitorial enquiry so that public interests of such public trusts are properly served. The Charity Commissioner has to act as protector of public charities. In my view, the Charity Commissioner has acted properly and approval given by the Charity Commissioner is legal and valid.

8.6 As regards Section 36 of the Act, an appeal has been provided before the board of Gujarat Revenue Tribunal. As stated earlier, in this case, an appeal was filed before the revenue tribunal on 4th December, 2003, thereafter as indicated in this behalf that though stay application was filed the petitioner in SCA No.515/2005 did not obtain any interim order and thereafter several applications were filed namely, 8.3.2004, 17.3.2004 and also on 24.3.2004, and it was made clear that the trust has sold the property as per the order of the Charity Commissioner which stipulates that the property has to be sold in certain times. In spite of the fact that the petitioner was aware about this fact, the petitioner did not move the tribunal early and thereafter the matter was heard and ultimately on 25.10.2004 (communicated on 8.11.2004) the tribunal decided the matter in this behalf.

8.7 The order of the tribunal so far as against the trust, the trust have filed SCA No.16657 of 2004. The learned counsel for the trust has submitted that Rameshchandra Gordhanbhai Patel and Rachnaben Mahesbhai Patel had filed appeal before the revenue tribunal with a view to harass and with an oblique motive as they have not been awarded tenders. It was submitted that the tribunal has not appreciated the fact that they have been given the opportunity for higher bidding but they refrained themselves to bid more and insisted on the amount of the tenders, i.e. Rs.25.00 lakhs but

M/s.Detostop India Pvt.Ltd. has offered Rs.61,000/more. So obviously the tender was awarded to M/s.Detostop India Pvt. Ltd at Rs.25,61,000/- in the interest of the trust.

8.7A In my view the tribunal has not appreciated the fact that the condition of the tender was that 10% deposit should be submitted by way of Demand Draft in the name of the trust. The essential condition is the deposit of the amount Demand Draft is just a way to fetch the object and the said object has been fulfilled by M/s.Detostop India Pvt.Ltd. which has deposited Rs.2,50,000/- by way of cheque. The said cheque has been duly honoured, while Rameshchandra Gordhanbhai Patel and Rachnaben Maheshbhai Patel has given deposit of Rs.2,25,000/- which is less than 10%. But the essential condition, i.e. deposit of 10% has not been fulfilled and after the day of opening the tender, they have offered the balancing amount of Rs.26,000/- by way of pay order. But the said amount has been deposited after the date of opening the tender, i.e. on 15.1.2003. So the offer of Rameshchandra Gordhanbhai Patel is not a valid offer in the eye of law and the tribunal has failed to consider this aspect, and to that extent, in my view the tribunal order is inconsistent with the normal terms and conditions of tender in this behalf.

8.8 From the record it appears that the tribunal has not properly appreciated the fact and guided by the sole reason that the sale deed has been given in the name of Parshwa Reality Pvt. Ltd. Section 36 requires the sanction of the Charity Commissioner, but further it is not required that it should be given only in the name of any particular person. The object behind sec.36 has been briefly discussed by this Court in the case of Thakorebhai Gangaram (supra) which I have quoted earlier and the said principle have been fulfilled in this behalf.

8.9 From the record it appears that the sale has been executed in favour of Parshwa Realty Ltd., the Charity Commissioner was aware about this fact and the Charity Commissioner has given approval to this behalf. In my view the transaction is in conformity of the principle laid down in the decision of the Bombay High Court in the case of Rahimtulla Lowji Damani (supra) which I have quoted in this behalf.

8.10 I have considered the facts and circumstances of the case. In my view the Charity Commissioner has acted properly, however, the tribunal appellate authority while exercising powers under sec.36(3) of the Act could not

have taken upon itself the task of substituting its decision to that of Charity Commissioner when the legislature has thought it fit to invest the power in the Charity Commissioner. The appellate authority has not considered this aspect and to that extent the reasonings of the tribunal is not legal and valid.

8.11 From record it appears that the tribunal has not properly appreciated the fact and come to the conclusion that there is a collusion and fraud between the trust and Detostop India Pvt. Ltd. and there is a malafide intention appears from the registered sale deed. From record this Court is of the view the entire transaction is absolutely at arms length and there is no reason, and the tribunal ought not to jump to such conclusion merely on the basis of conjectures and surmises. The petitioner in Special Civil Application No.515 of 2005 has not been able to show any malafide or collusion or fraud by which the trust has entered into transaction with Detostop India Pvt. Ltd. initially and thereafter with Parshwa Reality Pvt. Ltd. in this behalf. In fact the trust has been able to show that the entire transaction is reasonable, legal, valid and transparent.

8.12 I have considered the facts and circumstances of the case. In my view once the sanction is accorded under sec.36 of the Act, there is no embargo to sell the property. The purpose behind this section 36 has been overlooked by the tribunal. The purpose is to avoid misappropriation of the property of the trust, the Charity Commissioner after taking into consideration relevant factors accord sanction under Sec.36 of the Act. It is with the trustees to enter into agreement. It is no doubt true that the appeal has been filed but before the tribunal the respondents have made it clear that, as per the order of the Charity Commissioner, they have to sell the property in certain period, however, petitioner Rameshchandra G.Patel did not initiate any action to obtain stay to the order of the Charity Commissioner and did not proceed further till the appeal decided by the tribunal in December 2004.

8.13 From the record it appears that though the tribunal decision is of 25.10.2004, the petitioner Rameshchandra G.Patel and others have filed present petition on 17th January, 2005, and they have not obtained any order of this Court in the said matter. This Court has only issued notice on 25th January, 2005, in view of the earlier petitions which are pending where the trust has also challenged the order of the tribunal as well as M/s.Detostop India Pvt. Ltd., and in view of

the said proceedings, this Court has not passed any order and thereafter the matter was heard in the month of March/April 2005.

8.14 The tribunal has not properly appreciated the fact that property is being used for the purpose of Dharamshala i.e. the purpose for which the trust has been created. But, there is a consequent failure of the object for which the trust has been created as it is not possible to use it for the purpose of Dharamshala in that area.

9. It may be noted that, once the tender of respondent No.3 M/s.Detostop India Pvt. Ltd. is accepted, it is open for M/s.Detostop India Pvt. Ltd. to see that ultimately sale deed be executed in favour of Parshwa Realty Pvt. Ltd. - respondent No.4, as per the judgment of Bombay High Court in the case of Rahimtulla Lowji Damani (supra), the said transaction is also legal and valid and there is no illegality in this behalf. The reliance placed by the learned counsel for the petitioner - Rameshchandra Gordhanbhai Patel in the judgment of Monarch Infrastructure (supra) does not help the case of the petitioner.

10. As regards process of tender, learned counsel for the trust relied upon the judgment of Hon'ble Apex Court in the case of M/s.Podder Steel Corporation (supra), the judgment of Andhra Pradesh in the case of M/s.Jyothi Krishna Engineers (supra) and also Food Corporation of India's case (supra), and all these principles it is now established that, once the process of tender is transparent namely advertisement was given, tender was invited and the higher offer was accepted, the same is legal and valid. In this case also the trust had filed a resolution, advertisement was given, and thereafter highest bidder was accepted and, therefore, the action of the trust is legal and valid in this behalf.

11. I have considered the judgment of this Court in the case of Patel Scrap Traders Vs. State of Gujarat decided in Special Civil Application No.4630 of 2004 dated 7.6.2004 which is reported in AIR 2005 Gujarat 13 particularly para 7.11(G) where this Court quoted the judgment of Hon'ble Apex Court in the case of Radhey Shyam Vs. Shyam Behari Singh reported in AIR 1971 SC 2337.

11.1 I have also considered para 9.6 on page 35 of the said Patel Scrap's case (supra) in which this Court has considered in that case constitution of State Level

Committee regarding acceptance of tender. In my view, on this very principle the trustees have also accepted the offer of respondent No.3 M/s. Detostop India Pvt. Ltd. which is legal and valid wherein the sale has been after due publicity and maximum price has been accepted in this behalf. So there is no malafide, bad faith, malice or fraud which has been alleged by the petitioner and in absence of the same this Court has very limited jurisdiction in connection with acceptance of tender and when trustees have shown that the action is bonafide, this Court may not interfere in this behalf.

11.1A I have also relied upon para 9.6A and 9.6B of Patel Scrap Trader's case (supra) regarding principle of sale. Once the respondent no.4 has entered into contract and registered documents has been executed, the sale is complete and, therefore, this Court may not interfere in this behalf. Thereafter in para 9.6 the Court has considered the definition of what is tender and also in para 10 the Court has considered Sec.4 and Sec.19 of the Sale of Goods Act, Section 37 of the Indian Contract Act where it has been held that once the contract is entered into between the parties and the possession is also given to respondent No.4, in view of the same, this Court may not exercise the jurisdiction in this behalf.

11.1B It may be noted that against the said judgment, Letters Patent Appeal No.1353 of 2004 in Special Civil application No.4630 of 2004 was filed before this Court and the Division Bench of this Court (Coram: M.S.Shah & D.A.Mehta, JJ.) in the matter of Patel Scrap Traders decided on 24.8.2004 has also confirmed the principle laid down therein. However, on facts of the case, as the offerer has offered some more amount, his offer was accepted, but as regards law is concerned, the Court has confirmed the principle.

11.1C I have also considered the judgment of the Hon'ble Apex Court in the case of M/s.Poddar Steel Corporation (supra), Food Corporation of India (supra) and judgment of this Court in M/s.Jyothi Krishna Engineers (supra). From those judgments, it is clear that though the trustees have slightly modified regarding the payment of draft, instead of draft they have accepted the cheque, the said condition is not essential condition and the trustees were entitled to modify the same. Ultimately the aim was to accept/receive the highest price which has been done in this behalf. So the action of the trustees are in consonance with the aforesaid judgments of this Court.

11.1D I have also considered the judgment of this Court in Saurashtra Paper and Board Mill's case (supra), and from the said decision, it is true that the petitioners are not entitled to equitable relief. I have also considered the judgment of Bombay High Court in the case of Rahimtulla Lowji Damani (supra), and therefore, even though the ultimate offer was accepted by respondent No.3, but the sale is done in favour of respondent No.4, and therefore there is no illegality and the same can be done in view of the judgment of Bombay High Court in this behalf.

11.1E It may be noted that at the fag end of argument, learned advocate for the petitioner has given offer of Rs.45.00 lakhs, the same may be attractive but the same cannot be accepted. This affidavit led me to consider the fact that there must be some terms of the enforcement of contract and sanctity of contract that has to be considered.

11.1F I have also considered Pollock & Mulla on Contract Act, Indian Contract and Specific Relief Acts, 11th Edition, (Volume I by R.K.Abichandani - page 593).

"Sanctity of contracts :- Observations of Denning L.J. in British Movietonews case (Re: British Movietonews Ltd. v. London & Distt. Cinemas Ltd., (1951) 1 K.B. 190, 201; (1950) 2 All E.R.309, 396; relying on John Lee & Son v. Railway Executive (1949) 2 All E.R.581; Dennis Reed Ltd. v. Goody (1950) I All E.R.919; Bennet Walden & Co. v. Wood (1950) 2 All E.R. 134; British Movietonews Ltd. refd. to in Boothalinga Agencies v. Poriaswami Nadar (1969) A.SC. 110, 116) that sanctity is not now attached to contracts which was previously attached were not accepted by the House of Lords on appeal. Viscount Simonds said (Re: 1952 A.C.166; referred to in Alopi Parshad v. Union of India (1960) 2 S.C.R. 793, 807; (1960) A.SC. 589, 594, Sir Lindsay Parkinson & Co. Ltd. Vs. Commissioner of Work (1949) 2 K.B. 632 held did not help the construction of Denning L.J.):

"..... It is no doubt essential to the life of the common law that its principles should be adapted to meet fresh circumstances and needs. But I respectfully demur to the suggestion that there has been or need be any change in the well-known principles of construction (except so far as the recent Act of 1943 provides) in the

application of the law of frustration to commercial agreements and if indeed as Denning L.J. appears to suggest such cases as Lee's, Reed's and Bennet's illustrate such a change they would be regarded as of doubtful authority."

"Licence - Sanctity of Contract and Freedom of Speech - The National Front a political body hired a Council Hall for holding a conference for which they paid a hire of 6,000 pound. Later the council on a change in its political constitution by Labour Party replacing Conservative Party repudiated the contract of lending the hall and the National Front sued for specific performance which was granted and the Court of Appeal confirmed the order on the ground "that specific performance could be granted for a contract of short duration having regard to the fact that the court must defend any interest in land, estate or a licence, by injunction or specific performance, it was appropriate so to do." Further the court should in an appropriate case order specific performance where a licence had been wrongfully repudiated and Sanctity of contract and freedom of speech were relevant matters to be taken into consideration (Re: Verall v. Great Yarmouth Borough Council (1980) I All E.R. 839, 843; Glasher v. Woolgar & Roberts (1891) 41 Sol. Jo.573; Booker v. Palmer (1942) All E.R. at p.677 disappd.)"

11.1G For sanctity of contract, I rely upon "Anson's Law of Contract", 27th Edition (1998) page 7 - 16. The same is being reproduced hereinbelow:

page 7 "Sanctity of Contracts :- Closely associated with the concept of freedom of contract is yet another principle, that of the sanctity of contracts. (Re: Hughes Parry, The Sanctity of Contracts in English Law (1959), and post, p.17). Business people in particular are concerned to ensure that the parties to a contract keep to their bargain and that as few avenues as possible should be afforded for escape from contractual obligations. In general, English law is reluctant to admit excuses for non-performance."

page 16 "We have noted that the concepts of freedom of contract and sanctity of contract were at their strongest during the nineteenth century. In 1875

Sir George Jessel M.R. stated {Re: Printing & Numerical Registering Co. v. Sampson (1875) L.R. 19 Eq.462, at p.465}

if there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of justice.

This was said to have led to the reduction of supervision over the contractual terms to a bare minimum (Re: Atiyah, The Rise and Fall of Freedom of Contract (1979). But cf. Simpson (1979) 46 U. Chi.L.Rev. 533; Barton (1987) 103 L.Q.R. 118) and the deprivation of the tools available for such control of much of their effectiveness. The doctrine of consideration acquired a pre-dominantly formal meaning, although it was on occasion used to invalidate unfair agreements (Re: Stilk v. Myrick (1809) 2 Camp. 317; 6 Esp.129, at p.248). A substantial part of the law of contract was attributed to the parties' agreement, and the role of equity, with its discretionary remedies, and its ability to avoid common law rules, was less central."

11.1H I have also considered the Chitty on Law of Contracts, 24th Edition (1999) page 7 - para 1-010:

"Freedom of contract in the nineteenth century:

In the nineteenth century, freedom of contract was regarded by many philosophers, economists and judges as an end in itself, finding its philosophical justification in the "will theory" of contract and its economic justification in laissez faire liberalism. (Re: See Dicey, Law and Opinion in England (2nd ed., 1914), pp 150158; Printing and Numerical Registering Co. v. Sampson (1875) L.R. 19 Eq. 462, 465, per Jessel M.R.; Manchester, Sheffield and Lincolnshire Ry. v. Brown (1883) 8 App. Cas. 703-716-720, per Lord Bramwell; Salt v. Marquis of Northampton [1892] A.C. 1, 18-19, per Lord Bramwell). It is instructive to observe that Lord Bramwell, who was one of the foremost judicial champions of freedom of contract, also believed in the necessity for a real as opposed to an apparent consent: see his judgment in

British and American Telegraph Co. Ltd. v. Colson (1871) L.R. 6 Ex.108, and his dissenting judgment in Household Fire Insurance Co. v. Grant (1879) 4 Ex. D. 216, 232, See further, Atiyah, The Rise and Fall of Freedom of Contract (1979) and cf. Gordley, op. cit.pp. 214-217}. Thus, the parties were to be the best judges of their own interests, and if they freely and voluntarily entered into a contract, the only function of the law was to enforce it."

11.1H/1 In modern law:- Moreover, as a general principle, freedom of contract has considerable support in the modern judiciary. For example, in 1966, Lord Reid rejected the idea that the doctrine of fundamental breach was a substantive rule of law, negativing any agreement to the contrary (and capable of being used to strike down an exemption clause) {Re: See Suisse Atlantique Societe d' Armement Maritime SA v. N.V.Rotterdamsche Kolen Centrale [1967] 1 A.C. 361} on the ground, inter alia, that this would restrict "the general principle of English law that parties are free to contract as they may think fit." {Re: ibid. at 399}. In 1980, in the same context, Lord Diplock observed that "[a" basic principle of the common law of contract .... is that parties to a contract are free to determine for themselves what primary obligations they will accept.{Re: And see Eurico SpA v. Philipp Brothers [1987] 2 Lloyd's Rep. 215, 218 (term to do the impossible valid)}. Moreover, the courts have proved unwilling to strike down contracts on the ground simply that one of the parties suffered from an "inequality of bargaining power."(Re: National Westminster Bank plc. V. Morgan [1985] 1 A.C. 686, 708, disapproving the dictum of Lord Denning M.R. in Lloyds Bank Ltd. v. Bundy [1975] Q.B. 326, 339}"

12. In view of this a concomitant of the doctrine of freedom of contract is the binding force of contracts, a force which is a classical Roman jurist compared to the binding force of the law itself. The English law has long recognised this principle, which suits the need of a commercial community.

{Re: Chitty On Contracts, Volume 1, 29th Edition (1999) page 10 - para 1-016}.

13. It may be noted that the additional affidavit filed by M/s.Parshwa Reality Pvt. Ltd. where they have already constructed and changed the situation in this behalf, and therefore, on the question of equitable relief, I have considered the judgment of Saurashtra Paper & Board Mills (supra), and on this equitable ground also the petitioner Rameshchandra Gordhanbhai Patel is not entitled to any relief in this behalf in view of the judgment of this Court in the case of Patel Scrap Traders (supra).

14. In view of aforesaid discussion, the contention of the petitioner in SCA No.515 of 2005 that they want to offer Rs.45.00 lakhs, this submission cannot be considered because this is completely after thought in this behalf. Once the contract were already entered into which is concluded contract. The same was executed and operated upon. The Charity Commissioner has given approval also and thereafter appeal has been filed and appeal has been decided and thereafter the matter was heard at this stage, and now the petitioners are offering Rs.45.00 lakhs, therefore, this fact cannot be considered in this behalf. This fact was not before the tribunal or the Charity Commissioner. So under Article 227 of the Constitution of India, this Court cannot consider the additional fact by Rameshchandra Gordhanbhai Patel in this behalf.

15. As regards Special Civil Application No.16657 of 2004 filed by trust is concerned, this Court may issue a writ of certiorari for quashing and setting aside the order of Gujarat Revenue Tribunal dated 25.10.2004 in Appeal No.TEN.AA/53/2003 so far as the same is against the trust and this Court further restore the order of Joint Charity Commissioner dated 14.11.2003 by which the trustees have accorded approval under sec.36 of the Act regarding acceptance of the tender. To that extent, the Special Civil Application No.16657 of 2004 is partly allowed. Rule is partly made absolute to that extent. No order as to costs.

16. As regards Special Civil Application No.16716 of 2004 is concerned, as the earlier petition i.e. SCA No.16657 of 2004 is allowed, this petition is also partly allowed because here also the petitioners have also challenged the order of the tribunal dated 25.10.2004 passed in Appeal No.TEN.AA.53/2003 for which I have already granted the earlier matter i.e. SCA No.16657 of 2004, and therefore this petition is also partly allowed. Rule is partly made absolute to that extent. No order as to costs.

17. It may be noted that in this case the Charity Commissioner granted permission on 14.11.2003. Thereafter the contract was executed between trust and respondent no.4 on 6.5.2004. Thereafter appeal was filed before the tribunal which was ultimately disposed of somewhere in October/November 2004. The respondent No.4 thereafter started construction and he has filed additional affidavit in this behalf where flats were constructed and the third parties rights are also created. While from the record this fact establish, so this Court could take note of subsequent event and arrived at a conclusion that now petitioner is not entitled to any relief at this belated stage. If any relief is given that will affect the sanctity of contract, enforcement of contract and it well known principle that when court has to give relief, the court has to mould the relief by looking to the subsequent event in this behalf. A subsequent event is also establish that petitioner in SCA No.515 of 2005 is not entitled to any relief at this stage.

18. As regards Special Civil Application No.515 of 2005 is concerned, the same is rejected. There will be no order as to costs. Rule is discharged.

19. This Court is extremely grateful to Mr.R.D.Dave, learned advocate who is appearing on behalf of petitioner in Special Civil Application No. 515 of 2005 and Mr.P.M.Thakkar, learned Senior Counsel with Ms.Shaili A.Kapadia, learned advocate who appeared on behalf of trust, Mr.Mukesh Patel, learned AGP for the Charity Commissioner, Mr.M.I.Merchant, learned advocate appeared on behalf of M/s.Detostop India Pvt. Ltd. and Mr.J.B.Pardiwala, learned advocate appeared on behalf of M/s.Parshwa Realty Pvt.Ltd. It may be noted that record is voluminous in all the three matters and the question of law also raises very importance and large number of authorities cited by the learned counsel for the respective parties and without their valuable assistance the Court could not able to decide the same within very short time in this behalf.

(K.M. Mehta, J.)

syed/